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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
SIXTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

JOSE ANGEL HERNANDEZ,

Defendant and Appellant.

H034930

(Santa Cruz County

Super. Ct. No. F15321)

On October 26, 2007, pursuant to a negotiated disposition, defendant Jose Hernandez pleaded no contest to one count of possession of a firearm by a felon (Pen. Code, § 12021, subd. (a)(1)). In exchange for his plea, defendant was promised a state prison sentence of 16 months and the dismissal of three other counts and two sentencing enhancement allegations.

On July 27, 2009, defendant filed a written motion to withdraw his plea.

On September 3, 2009, the court denied defendant's motion to withdraw his plea, and thereafter imposed the 16-month prison term sentence as per the negotiated disposition and imposed various fines and fees.

Defendant filed a notice of appeal on October 29, 2009, "based on the sentence or other matters occurring after the plea" and challenged "the validity of the plea or

admission." Defendant sought a certificate of probable cause, which the trial court denied.

We appointed counsel to represent defendant in this court. Counsel filed an opening brief that stated the facts, but raised no specific issues.

On March 30, 2010, we notified defendant of his right to submit written argument on his own behalf within 30 days. To date, we have not received a response from defendant.

Pursuant to *People v. Wende* (1979) 25 Cal.3d 436 and *Anders v. California* (1967) 386 U.S. 738, we have reviewed the entire record and have concluded there are no arguable issues on appeal, including the two questions that counsel raised to guide our review.<sup>1</sup> Pursuant to *People v. Kelly* (2006) 40 Cal.4th 106, we provide "a brief description of the facts and procedural history of the case, the crimes of which the defendant was convicted, and the punishment imposed." (*Id.* at p. 110.) We have included information about aspects of the trial court proceedings that might become relevant in future proceedings. (*Id.* at p. 112.)

#### *Facts and Procedural History*

The record does not contain the facts underlying the weapons possession charge. However, on May 15, 2007, the Santa Cruz County District Attorney filed a complaint in which defendant was charged with two counts of possession of a firearm by a felon (Pen. Code, § 12021, subd. (a)(1), counts one and two), one count of obliterating the identification of a firearm (Pen. Code, § 12090, count three) and one count of possession of ammunition (Pen. Code, § 12316, subd. (b)(1), count four). The complaint contained a prior prison term allegation within the meaning of Penal Code section 667.5 and a strike prior within the meaning of Penal Code section 667, subdivisions (b)-(i).

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<sup>1</sup> Counsel posed the following questions to guide our review. First, did the trial court err in denying a certificate of probable cause? Second, did the trial court err in refusing to allow defendant to withdraw his plea?

As noted on October 26, 2007, defendant entered a no contest plea to one of the weapons possession charges.

Before taking defendant's plea, the court advised defendant of his trial rights, specifically, of his privilege against self-incrimination, his right to confront his accusers and his right to trial by jury as required by *Boykin v. Alabama* (1969) 395 U.S. 238, and *In re Tahl* (1969) 1 Cal.3d 122. Further, the court advised defendant that he had a right to subpoena witnesses. Defendant stated that he understood and gave up those rights. Defendant was advised that after he served his sentence he would be placed on parole for four years; that if he violated his parole he could be returned to state prison for up to one year and his parole could be extended for an additional year. The court advised defendant of the possible immigration consequences of his plea; and that he would have to pay a restitution fund fine of \$200. Counsel stipulated that there was a factual basis for the plea. The court found defendant's plea to be "freely and voluntarily made." The court set a sentencing date of November 14, 2007.

According to defendant, later that day the District Attorney filed a new complaint against him in which he was charged with first degree murder with special circumstances (Pen. Code, §§ 187, 190.2, subd. (a)(2)). The special circumstance being a killing while the defendant was an active participant in a criminal street gang as defined in Penal Code section 182.22.<sup>2</sup>

At the November 14, 2007 hearing, the court appointed counsel to advise defendant regarding withdrawing his plea. Thereafter, the sentencing hearing was continued many times. On July 27, 2009, defendant filed a motion to withdraw his plea. Defendant asserted that Penal Code section 1018 allows a plea to be withdrawn for good cause any time before entry of judgment and that good cause means "mistake, ignorance,

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<sup>2</sup> Defendant has not provided this court with a copy of the complaint in the new case.

*fraud*, duress or any other factor that overcomes the exercise of free judgment." Further, fraud "has been defined as '[t]he suppression of that which is true, by one having knowledge or belief of the fact.' "

Defendant contended that the prosecutor had committed fraud by concealment, "by not informing him that on the same day of [his] plea the prosecution was going to file murder charges against him, with gang allegations, knowing that the conviction in this case could easily be used to significantly bolster its murder case against" him. In his declaration, defendant asserted that if he had known that he was about to be charged with other crimes he would never have entered a plea in this case because he "kn[e]w that the plea in this case [could] be used against [him] at trial" in the murder case.

The prosecution filed a written motion in opposition to defendant's motion to set aside his plea. The prosecutor did not deny that she knew that defendant was about to be charged in the new case when defendant was offered a plea in the weapons possession case and when he entered his plea. Nor did she deny that she deliberately concealed the fact from defendant. However, the prosecutor contended that no representations were made about the pending charges and that the prosecution does not have a duty to disclose pending filings. Furthermore, defendant's declaration was deficient.

At the hearing on defendant's motion, the court denied defendant's motion to withdraw his plea on the ground that there was "insufficient evidence and good cause to show by clear and convincing evidence that the defendant's plea was a result of fraud by the People. [¶] The fact that they choose to file a[n] independent case, charges unrelated to this case in question does not create fraud under any of the case law that's been cited . . . ."

Thereafter, the court sentenced defendant as per the negotiated disposition with credit for time served of 1,070 days. The court imposed a \$200 restitution fund fine pursuant to Penal Code section 1202.4, subdivision (b); imposed but suspended a parole revocation fine in the same amount pursuant to Penal Code section 1202.45, subdivision

(b); and imposed a \$30 court security fee pursuant to Penal Code section 1465.8 and a \$30 facilities needs assessment pursuant to Government Code section 70373.

As noted, defendant filed a timely notice of appeal and requested a certificate of probable cause on the ground that his no contest plea was obtained as a result of fraud perpetrated by the District Attorney's Office. After the court denied defendant's request for a certificate of probable cause, defendant filed a Petition for Writ of Mandate in this court on December 24, 2009, seeking an order that a certificate of probable cause issue. On January 6, 2010, this court denied defendant's petition.

On January 14, 2010, defendant filed a petition for review of this court's decision in the California Supreme Court, which the Supreme Court denied on February 18, 2010.<sup>3</sup>

#### *Discussion*

As to the first issue that defendant suggested to assist the court in conducting our independent review, we may not review the denial of a certificate of probable cause on appeal. An order denying an application for a certificate of probable cause is not an appealable order and may be reviewed only by a petition for writ of mandate. (See *People v. Castelan* (1995) 32 Cal.App.4th 1185, 1187-1188; *People v. Holland* (1978) 23 Cal.3d 77, 84, fn. 6, overruled on other grounds in *People v. Mendez* (1999) 19 Cal.4th 1084, 1097, fn. 7, 1098; see also *People v. Stubbs* (1998) 61 Cal.App.4th 243, 244-245.)

As to the second issue that defendant suggested, defendant claimed that the prosecution obtained his plea as a result of fraud because the prosecution failed to inform him that it was going to file murder charges against him. However, defendant did not make any argument in his request to withdraw his plea that the prosecution was required to inform him that he was facing charges in an unrelated murder case. Certainly, the prosecution has a duty to "disclose material *exculpatory evidence* whether the defendant makes a specific request

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<sup>3</sup> Again, defendant has not provided this court with a copy of either petition. However, in the interest of judicial economy, on our own motion, we will take judicial notice of this court's records in H035105 and the Supreme Court's records in S179442.

[citation], a general request, or none at all [citation]." (*In re Brown* (1998) 17 Cal.4th 873, 879, italics added.) We can find no case, statute or constitutional principle that mandates a duty to disclose other possible pending cases during plea bargaining. While it is understandable that defendant would have liked to have known such fact prior to the plea, there is no reasonable basis for concluding that the purported concealment would overcome his exercise of free judgment.

In conclusion, our review of the entire record satisfies this court that defendant's attorney has fully complied with his responsibilities and that no arguable issues exist. (*People v. Wende, supra*, 25 Cal.3d at p. 441.)

*Disposition*

The judgment is affirmed.

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ELIA, J.

WE CONCUR:

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PREMO, Acting P. J.

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McADAMS, J.